STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

FIRESIDE MOBILE HOME LEASING CO., INC. : DETERMINATION
DTA NO. 816686

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1992 through February 28, 1995. :

Petitioner, Fireside Mobile Home Leasing Co., Inc., 55 Carlton Avenue, East Islip, New York 11730-2133, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1992 through February 28, 1995.

A hearing was commenced before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on March 23, 1999 at 10:30 A.M. and was continued to conclusion before the same Administrative Law Judge on April 21, 1999 at 10:30 A.M., with all briefs to be submitted by October 15, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared by Marvin Rosenthal, Esq. The Division of Taxation appeared by Terrence M. Boyle, Esq. (James Della Porta, Esq., of counsel, at the hearing and Robert A. Maslyn and Cynthia E. McDonough, Esqs., of counsel, on the brief).

ISSUES

I. Whether the restitution ordered by the criminal court satisfied all civil liability of petitioner for the period at issue, thereby prohibiting the Division of Taxation ("Division") from assessing penalty and interest.

II. Whether the failure by the Division of Taxation to advise petitioner, prior to its plea, that it could later be assessed for penalty and interest estopped the Division from assessing such penalty and interest after petitioner's payment of the court ordered restitution.

III. If not, whether the Division of Taxation properly assessed the fraud penalty against petitioner.

IV. Whether the Division's failure to present its claim for civil penalties and interest prior to or at the plea hearing during which petitioner agreed to pay restitution caused petitioner undue harm thereby properly creating the defense of laches.

V. Whether the check issued by petitioner in payment of the restitution contained language which created an accord and satisfaction as to all obligations for tax, penalty and interest owed by petitioner.

FINDINGS OF FACT

1. During the period at issue, Fireside Mobile Home Leasing Co., Inc. ("petitioner") was in the business of leasing mobile homes or trailers, as temporary living quarters, to people who had fires at their homes. The bill for the lease of the mobile home was paid either by the person who temporarily resided in the mobile home or by an insurance company.

2. Since petitioner's inception in 1989, James Belt was the president. His brother, Lee Belt, was a foreman employed by petitioner, but he owned no part of the business.

3. In 1994, the Suffolk County District Attorney's Office ("the DA's Office") began an investigation of petitioner and James Belt as a result of a complaint received regarding mobile

homes being leased by petitioner which did not meet the standards of the U.S. Department of Housing and Urban Development ("HUD"). A warrant was obtained to search petitioner's business premises, and the search was conducted in February 1995. Among the records seized were HUD identification tags (which were to be affixed to mobile homes)[1] along with sales, payroll and general business records.

The investigation disclosed that out of approximately 100 trailers or mobile homes, only 9 or 10 had the proper tags affixed. Of the remaining trailers, some had no tags and some had tags which were in the wrong place which led the investigators to believe that the tags had been removed and affixed to "inappropriate" trailers. When the DA's Office attempted to verify the tag serial numbers (which are similar to vehicle identification numbers) with HUD, it was discovered that, in many cases, the serial numbers did not match the trailer to which they were affixed.

4. While the main focus of the investigation centered around the HUD identification tags, the DA's Office seized a series of files (approximately 200 files) pertaining to each trailer and to each individual to whom that trailer was rented. Each file contained petitioner's invoices including the amount of sales tax charged by petitioner. A review of these files by investigators in the DA's Office indicated that there appeared to be a significant discrepancy between the amount of sales tax collected and the amount reported on petitioner's sales tax returns. The DA's Office then referred the matter to the Revenue Crimes Bureau of the Division of Taxation ("Division").

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[1] Affixation of these HUD identification tags or stickers indicates that the mobile home or trailer meets Federal standards for safety and fire codes.

5. Tax Auditor II Gerald Rauzi of the Division's Revenue Crimes Bureau performed an audit of petitioner's records which had been seized by the DA's Office, and he determined that, for the period at issue, petitioner had total sales of $1,112,132.93 and had collected sales tax in the amount of $94,016.63. However, petitioner had reported sales totaling $210,039.00 for this period and had reported and paid sales tax in the amount of $17,822.36. Accordingly, the auditor determined that petitioner owed additional sales tax in the amount of $76,194.27.

6. Following this investigation, James Belt, Lee Belt and petitioner were indicted by the Grand Jury of Suffolk County, in a 16-count indictment, on various charges relating to the trailers and the HUD identification tags. These charges included Grand Larceny in the Second Degree, Scheme to Defraud in the First Degree, Offering a False Instrument for Filing in the First Degree and Making an Apparently Sworn False Statement in the First Degree.

Subsequently, in a 19-count indictment resulting from that portion of the investigation which pertained solely to the sales tax issues, petitioner and James Belt were indicted by the Grand Jury of Suffolk County on charges of Grand Larceny in the Second Degree (one count), Filing a False New York State Tax Return (nine counts) and Offering a False Instrument for Filing in the First Degree (nine counts).

7. Suffolk County Assistant District Attorney Diane Leonardo Beckmann stated that her office's initial offer during plea negotiations with Attorney Harvey Arnoff, who represented both petitioner and James Belt in this criminal proceeding, was a six-month jail sentence for Mr. Belt, five years probation and restitution by petitioner to the State.

Agreement was eventually reached between Ms. Leonardo Beckmann and Mr. Arnoff whereby petitioner and James Belt each pleaded guilty to one count of Offering a False Instrument for Filing in the First Degree in full satisfaction of all counts in the indictment

relating to the trailers and HUD identification tags and each pleaded guilty to Grand Larceny in the Third Degree[2] in full satisfaction of the indictment relating to sales tax. Ms. Leonardo Beckmann appeared at the hearing held in this matter and stated that she did not state to Mr. Belt or to his representative, Mr. Arnoff, that the payment of the $76,000.00 would satisfy, in full, the civil liability for penalty and interest. She also stated that during the plea negotiations, Mr. Arnoff did not state or propose that such payment would satisfy the civil liability for penalty and interest nor did he make an inquiry as to whether such payment would satisfy the civil liability.

On May 13, 1996, at a plea hearing before Hon. Anthony R. Corso, County Court Judge for the County of Suffolk, petitioner's principal, James Belt, admitted that between September 1, 1992 and February 28, 1995 in Suffolk County, he stole U.S. currency from the New York State Department of Taxation and Finance by underreporting the amount of sales and use taxes due to the State in an amount which was approximately $75,000.00. He also stated that with respect to the corporation, he authorized Mr. Arnoff to enter a plea of guilty to Grand Larceny in the Third Degree.[3] Upon entry of the plea, Judge Corso informed Mr. Belt that he would be placed on probation for a period of five years and that the corporation (the petitioner in this matter) would be ordered to pay restitution to the State in the sum of approximately $75,000.00.

At this plea hearing, Attorney Arnoff stated:

> [T]he people have made a representation as a condition of this plea that they will provide for me written communication from the State of New York indicating that for the periods of September of '92 through February

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[2] At the plea hearing held on May 13, 1996, Assistant District Attorney Diane Leonardo Beckmann amended Count 1 of the second indictment (pertaining to sales tax) whereby the charge of Grand Larceny in the Second Degree was reduced to Grand Larceny in the Third Degree.

[3] The sentence was predicated upon a plea of guilty by Mr. Belt and this corporate petitioner to Offering a False Instrument for Filing relative to the HUD tags placed on the trailers and to Grand Larceny 3rd Degree relative to the underreporting of sales and use taxes.

> 28th of '95 that this will be the total tax penalty and any obligation as it relates to sales and use tax imposed upon the corporation for that period of time.

The response of Assistant District Attorney Leonardo Beckmann was: "Judge, I don't know if I can obtain that. However, it's my understanding that this case was referred to us by the State Tax Department for prosecution."

8. A sentencing hearing relating to the charges against petitioner was held in the County Court of the County of Suffolk on November 18, 1996 at which time petitioner, by its representative, Attorney Harvey Arnoff, submitted a check in the amount of $76,105.00 to the Court. The check contained the following endorsement: "Restitution for New York State Sales Tax Including Penalties and Interest as agreed for FIRESIDE MOBILE HOME LEASING CO., INC. (I.D. #11-0372272) thru 2/28/95." Assistant District Attorney Diane Leonardo Beckmann, in an affidavit executed on April 16, 1999 (subsequent to her testimony at the hearing held in this matter on March 23, 1999) stated that she did not physically obtain possession of the check until the sentencing hearing was over and that, upon obtaining possession, she did not notice that the back of the check contained restrictive terms. She further stated that Mr. Arnoff never informed her that the check had such a restrictive endorsement.

9. A letter dated December 2, 1996 from Gary S. Alpert, an attorney with the Division's Revenue Crimes Bureau, to Attorney Harvey Arnoff, advised that the certified check in the amount of $76,105.00 was being returned in order for Mr. Belt to present a certified check in the amount of $76,194.27.[4] The letter further stated that the $76,194.27 "covers only payment of the tax liability and does not include interest or penalties."

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[4] Apparently, the parties had conversations in which Mr. Alpert had advised that the original check tendered by petitioner through Mr. Belt had been in an incorrect amount.

A new check in the amount of $76,194.27 was subsequently issued and on December 20, 1996, Mr. Arnoff sent a letter to Mr. Alpert which stated, "This letter shall confirm our many telephone conversations indicating that the check tendered to you on December 19, 1996 in the amount of $76,194.27 is for sales tax only and is not inclusive of interest and penalties if applicable." This check, a cashier's check dated December 12, 1996, contained an endorsement which stated: "In full satisfaction of all Sales Tax Liability through 2/28/95."

When the check was received by the Division, it was processed with an endorsement stamp that included the statement "under protest." This was in accordance with written instructions to the processing agent (in this case Fleet Bank) from the Division's Revenue Services Bureau.

10. Florita Didwell, Sales Tax Auditor I, was directed to compute penalty and interest to be assessed against petitioner after the criminal proceedings had been concluded. Prior to Ms. Didwell's involvement with this matter, the sum of $76,194.27 had already been paid by petitioner.

Based upon her review of the workpapers[5] of the audit performed by Gerard Rauzi of the Division's Revenue Crimes Bureau as well as a transcript of the plea hearing at which James Belt pleaded guilty to Grand Larceny 3rd Degree and admitted that he stole U.S. currency from the New York State Department of Taxation and Finance by underreporting sales and use taxes due to the State, she decided to assess the fraud penalty pursuant to Tax Law § 1145(a)(2).

Ms. Didwell stated that prior to her assessment of penalties and interest, a representative of petitioner reviewed the records of petitioner which had been seized by and were located at the Suffolk County District Attorney's Office. She further indicated that a subsequent audit of

[5] The workpapers included petitioner's payroll records which indicated that part of the amounts paid were on the books (designated "on") and part were off the books (designated "OTB").

petitioner for the period March 1, 1995 through February 28, 1998 had been performed and that $31,571.52 in additional sales and use taxes, plus penalty and interest, were due for that period. Ms. Didwell stated that the additional taxes were due for the same reason as the prior period, i.e., that petitioner collected tax and did not remit it to the Division.

11. On October 27, 1997, the Division issued a Notice of Determination to petitioner in the amount of $76,194.27, plus interest of $35,127.84 and penalties of $63,263.19. Petitioner was given a credit for the $76,194.27 previously paid as restitution pursuant to the criminal proceeding. Accordingly, the total amount due and owing was $98,391.03.

12. James Belt, petitioner's president, was not present at the plea bargain conferences between his attorney, Harvey Arnoff, and the Assistant District Attorney, Diane Leonardo Beckmann. He stated that he was told by Mr. Arnoff and by a "Clara Bata" of the Probation Department that the payment of $76,194.27 covered the tax owed plus any penalties and interest. That was the reason for the endorsement on the back of the first check issued by him. Mr. Belt stated that he was subsequently informed that there "was a mistake in arithmetic" which resulted in another check being issued. He admitted that the endorsement on the second check was reworded but he could not remember why.

Mr. Belt stated that his meeting with the woman from the Probation Department took place before he accepted the plea bargain. He stated that he "asked her if I pay this $76,000 how do I know they are not going to come after me next week for more money" (tr. p.249). Mr. Belt testified that she got a little upset because he asked her the same question three times, but "she said . . . that no way in hell can they come after me for any more money for this same period of time, or I would have never accepted the plea bargain" (tr. p.249).

Mr. Belt acknowledged that he was an experienced businessman who had been involved in the leasing of industrial and office buildings for a number of years prior to the formation of petitioner. He stated that he was ultimately responsible for maintaining petitioner's records and that he prepared and signed its sales tax returns. The figures for the sales tax returns were given to him by the office staff who obtained them from the bank deposits.

James Belt testified that, at the time he signed and filed the sales tax returns, he did not realize that he was filing false returns. He states that he admitted to the charge in court because he was threatened with a six-month jail term if he did not.

13. Delores C. Belt, wife of James Belt, stated that she went to all of her husband's meetings with the Probation Department. She recalled that he asked Ms. Cebada Mora "if he would have to pay more than that [the $76,000] and she said no. He asked her more than once and she got upset and she said no way that he would have to pay any more than $76,000."

14. In an affidavit sworn to on April 20, 1999, Peggy Cebada Mora, Senior Probation Officer in the Suffolk County Probation Department, stated that she conducted the pre-plea probation investigation of James Belt and Lee Belt in regard to the criminal charges arising from the HUD identification tags. The pre-plea investigation did not involve the criminal charges relating to the filing of false sales tax returns. She states that she met once, on February 22, 1996, with James Belt, but recalls no discussion of the charges pertaining to the sales tax returns.

After the guilty pleas were entered, Ms. Cebada Mora conducted an investigation for the purpose of submitting a written sentencing recommendation to the court. Assistant District Attorney Leonardo Beckmann submitted a recommendation to Ms. Cebada Mora's office that the sentence include a requirement that restitution in the amount of $76,194.27 be paid to the State. As part of the sentencing investigation, she interviewed James Belt on June 7, 1996 during which

he stated that "they [the District Attorney's Office] have my records. I am going to say that they are right about this [the amount of tax due] and I'll pay the taxes that I owe."

Ms. Cebada Mora states that at no time did she inform Mr. Belt or any representative of petitioner that any amount paid as restitution would satisfy petitioner's civil liability for penalty and interest. In addition, she states that she checked the Probation Department's records to determine if a "Ms. Claire Better" is a current employee and she found no listing in the Department's records for such a person.

15. At the plea hearing held in the Suffolk County Court on May 13, 1996, James Belt stated that he was pleading guilty of his own free will. The Court informed Mr. Belt that he had a right to a trial, to have the People produce their witnesses and have his attorney cross examine those witnesses and to take the stand or call witnesses to give testimony on his behalf. He was further informed that he had a right to have his guilt or innocence determined by a judge or jury, but once a plea of guilty was entered, those rights were given up. Mr. Belt acknowledged that he understood the judge's statements and, nevertheless, chose to enter a guilty plea.

16. At the hearing held in the matter at issue, petitioner's representative acknowledged that petitioner was guilty of civil fraud, but he contended that as long as the judge in the criminal proceeding did not include a penalty for civil fraud in his decision, the Division cannot then impose that penalty or any other civil penalty.

17. Harvey Arnoff represented both petitioner and James Belt at the criminal proceedings before the Suffolk County Court. He stated that petitioner's records were seized pursuant to a search warrant. Mr. Arnoff later hired an accountant, James F. Preston, to examine the business records for the purpose of determining if the amount of tax asserted to be due ($76,194.27) was the correct amount.

Mr. Arnoff stated that the accountant was permitted to look at only a portion of the records. Mr. Preston was shown a sampling of one or two years and, as a result, he could not determine whether the amount asserted was correct. Mr. Arnoff stated that he was told by the DA's Office that if he wanted to go into further detail, he could try the case.

There were discussions between Mr. Arnoff and Assistant District Attorney Diane Leonardo Beckmann about interest and penalties. These discussions occurred after the initial check, in an incorrect amount, was issued. Mr. Arnoff stated that it was his understanding that the payment of the $76,194.27 was a full and complete discharge of petitioner's obligation to the Division although he admitted that he never specifically asked if the payment satisfied the tax as well as the civil penalty and interest. Mr. Arnoff testified that Ms. Leonardo Beckmann said that she was authorized to settle the matter for the $76,194.27 for the Division and "[t]hat meant to me that that that included everything" (tr. p. 221). Mr. Arnoff acknowledged that there was no written plea agreement, that he had no notes relating thereto and that, after the plea was entered, he had no further communication with the DA's office to clarify the agreement.

SUMMARY OF THE PARTIES' POSITIONS

18. Petitioner contends as follows:

a. The DA's Office refused to make available all of petitioner's records which it had seized. Accordingly, petitioner was unable to contest the amount of tax which was asserted to be due for the period at issue. In addition, the auditor for the DA's Office who determined the amount of the assessment failed to examine outstanding accounts receivable to verify whether tax claimed to be due was, in fact, collected;

b. The Division should be estopped from assessing any amounts over and above the $76,194.27 which was paid by petitioner as restitution. Petitioner was led to believe that

the amount paid as restitution was in full satisfaction of all liability for the period. At no time did the Division or anyone representing the Division advise petitioner that civil penalties and interest could be assessed subsequent to its plea and payment of restitution;

c. The Division is guilty of laches since it failed to present a claim for penalties and interest prior to or at the hearing wherein petitioner's liability was determined and settled. The Division waited for an unreasonable amount of time after settlement before asserting its claim for penalties and interest thereby causing petitioner undue harm;

d. Pursuant to Penal Law § 60.30, the only item that can be imposed against petitioner is damages. Penalties are not damages; and

e. The DA's Office was put on notice that petitioner was claiming that the $76,194.27 was in full satisfaction of all tax, penalty and interest since it was written on the back of the check. Assistant District Attorney Diane Leonardo Beckmann examined the check but never told petitioner that she would not accept the check with the conditions set forth thereon. Therefore, the Division is estopped from assessing penalties and interest because doing so violated the agreement between its agent (Ms. Leonardo Beckmann) and petitioner.

19. In response, the position of the Division is as follows:

a. An audit was conducted by the Division which revealed that petitioner had failed to pay the correct amount of sales and use taxes. If petitioner contends that the amount of tax determined to be due was incorrect, it bears the burden of proof in that regard. Fraud penalty, pursuant to Tax Law § 1145(a)(2) was assessed for the reason that petitioner had failed to report and remit the substantial portion of tax which it had collected from its customers. In addition, petitioner pleaded guilty to criminal charges arising from its theft

of moneys from the State of New York which was due to its failure to accurately file sales tax returns and pay the correct amount due;

b. The restitution ordered by the Suffolk County Court in the criminal proceeding does not preclude the Division from assessing civil penalties and interest;

c. In order to avail itself of the doctrine of estoppel, petitioner must show that the Division made representations to petitioner, that petitioner had a right to rely on these representations and that it did so to its detriment. The Division adds that any representations made to petitioner by the prosecutor in the criminal proceeding are not binding on the Division;

d. Petitioner's argument that its canceled check constitutes an accord and satisfaction of its entire liability, inclusive of all penalties and interest, is without merit since accord and satisfaction is not among the procedures set forth in Tax Law § 171(18) and (18-a) which sets forth the legal authority for the Commissioner of Taxation and Finance to settle and compromise any civil tax liability.

CONCLUSIONS OF LAW

A. Initially, petitioner contends that it was not given the opportunity to review the entire audit to contest the amount of sales and use taxes found to be due and owing by the Division. This amount was then made part of the plea agreement, as restitution, by the DA's Office. As is the case in any sales tax audit, petitioner bears the burden of proof, by clear and convincing evidence, that the audit method employed and the resulting assessment are erroneous (***Matter of Sol Wahba, Inc. v. State Tax Commn.***, 127 AD2d 943, 512 NYS2d 542; ***Matter of Clarence R. Oliver Post Memorial, Inc. v. State Tax Commn.***, 101 AD2d 922, 475 NYS2d 623). Here, the only evidence presented by petitioner is the testimony of its representative at the criminal

proceeding before the Suffolk County Court, Attorney Harvey Arnoff, who stated that he hired an accountant, James F. Preston, to look at the records in possession of the DA's Office. Mr. Arnoff stated that the accountant was permitted to look at only a portion of the records and that, as a result, he could not determine whether the amount asserted to be due ($76,194.27) was, in fact, the correct amount. Mr. Preston did not appear to testify at the hearing nor did petitioner offer an affidavit from him. Moreover, petitioner offered no evidence that it attempted, through a Freedom of Information Law (FOIL) request or a subpoena, to obtain petitioner's books and records.

Mr. Arnoff stated that he was told that if he wanted to go into further detail, in lieu of accepting the plea bargain and paying the $76,194.27 as restitution, he could try the case. Whether this statement was, in fact, made, petitioner, presumably upon the advice of Mr. Arnoff's legal counsel, voluntarily elected to plead guilty and agreed to make restitution in the amount asserted by both the Division and the DA's Office to be the amount by which petitioner understated its sales and use tax liability.

The mere allegation that petitioner's representative was not permitted to examine all of the books and records seized by the DA's Office is insufficient to sustain its burden of proof to show that the amount of tax asserted to be due, i.e., $76,194.27, was erroneous.

B. While petitioner does contend, for various reasons, that *no* civil penalties or interest can be imposed after payment of the restitution, it has raised no issues with respect to interest or civil penalties, other than the fraud penalty imposed pursuant to Tax Law § 1145(a)(2). Accordingly, other than to address the issue of whether *any* penalties or interest may be imposed, only the imposition of the fraud penalty will be specifically considered herein.

C. Penal Law § 60.27(1) states that the court may require restitution as part of the sentence imposed and may require the defendant to make restitution of the "fruits of his or her offense or reparation for the actual out-of-pocket loss caused thereby." Penal Law § 60.27(6) states that "[a]ny payment made as restitution or reparation pursuant to this section shall not limit, preclude or impair any liability for damages in any civil action or proceeding for an amount in excess of such payment."

Therefore, the sentence imposed upon petitioner by the Suffolk County Court which required that it make restitution in the amount of $76,194.27 did not preclude the Division from instituting an action seeking interest and civil penalties.

D. At the hearing petitioner's representative maintained that the Penal Law states that the Judge, in a criminal case, can determine that there is a penalty to be imposed, but if he is silent as to penalty, none can thereafter be imposed. In the brief submitted by petitioner's representative, he contends that, pursuant to Penal Law § 60.30, the only item that can be imposed against petitioner are damages and that since penalties are not damages, it is improper to impose them "at this point in time."

Penal Law § 60.30 provides as follows:

> This article does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty and any appropriate order exercising such authority may be included as part of the judgment of conviction.

Nowhere in this statute is it stated that damages and only damages can be imposed against a defendant. In fact, the statute specifically provides for the imposition of a civil penalty but does not, as petitioner contends, state that if the civil penalty is not made a part of the judgment of conviction, it may not be imposed thereafter. As noted above, Penal Law § 60.27(6) states that

payments made as restitution shall not preclude or impair liability for damages in a civil action such as the one commenced herein by the Division upon its issuance of a Notice of Determination. It must be found, therefore, that petitioner's contentions that the Division may not seek interest and civil penalties after petitioner's plea and payment of restitution is wholly without merit. (***See, Matter of N.T.J. Liquors***, Tax Appeals Tribunal, May 7, 1992.)

E. The next issue to be addressed is whether the doctrine of estoppel is applicable in this matter. In order for the doctrine of estoppel to be applicable, petitioner must show that the Division made representations to petitioner which it had the right to rely upon and which it did rely upon to its detriment (***Matter of N.T.J. Liquors, Inc., supra***; ***Matter of Sliford Rest.***, Tax Appeals Tribunal, October 10, 1991).

In ***Chaipis v. State Liq. Auth.*** (44 NY2d 57, 62, 404 NYS2d 76, 78), the Court stated as follows: "A prosecutor's representation, even when qualified, impliedly or expressly, by the limited authority he possesses, to a criminal defendant or potential criminal defendant should not be lightly disregarded. While the representations may not bind other State agencies, they should not be ignored either." It must, therefore, be determined what representations, if any, were made to petitioner by the DA's Office in the plea negotiations which culminated in petitioner's entering a plea of guilty to Grand Larceny 3rd Degree in full satisfaction of the 19-count indictment pertaining to the sales and use tax matters and to Offering a False Instrument for Filing in the First Degree in full satisfaction of the 16-count indictment relating to the trailers and the HUD identification tags.

Assistant District Attorney Diane Leonardo Beckmann testified that she never stated during plea negotiations with petitioner's representative in the criminal proceeding, Harvey Arnoff, that the payment of the $76,194.27 in restitution for sales tax owed would satisfy the

civil liability for penalty and interest. She also testified that Mr. Arnoff did not state or propose, during the plea negotiations that the restitution payment would satisfy petitioner's civil liablity. Ms. Leonardo Beckmann stated that, at the time the plea was taken, Mr. Arnoff did seek to obtain a letter from the Division that the restitution payment would satisfy all of the sales tax liability for the period. While it is true that at the plea hearing held on May 13, 1996, Mr. Arnoff stated that a representation was made that as a condition of the plea, the People (the DA's Office) would provide him with a written communication from the Division indicating that "this will be the total tax penalty and any obligation as it relates to sales and use tax imposed upon the corporation for that period of time," the response of Ms. Leonardo Beckmann was that she did not know if she could obtain it (***see***, Finding of Fact "7").

Based upon Ms. Leonardo Beckmann's testimony and upon the letters exchanged between Gary S. Alpert, an attorney with the Division's Revenue Crimes Unit, and Mr. Arnoff (***see***, Finding of Fact "9"), petitioner's representative in the criminal proceeding understood that the payment of $76,194.27 was restitution for sales and use taxes only and did not include civil penalty or interest. Accordingly, it cannot be found that the DA's Office, as the agent of the Division in the criminal proceeding, made any representation or promise that could have or should have been relied upon by petitioner. Moreover, while James Belt contended at the hearing that he would not have accepted the plea bargain if he knew that "they could come after me for any more money" (tr. p.249), it seems far more plausible that he accepted the plea bargain simply to avoid having to serve time in jail. Mr. Belt testified that he admitted to the charges in court and agreed to pay the amount of restitution so as not to be sentenced to a jail term.

Having failed to prove that the Division, through its agent in the criminal proceeding (the DA's Office), made representations concerning the civil penalties and interest which petitioner

had the right to rely upon and, further, that petitioner did so rely upon these representations to its detriment, it is hereby determined that the Division was not estopped from assessing such penalties and interest after petitioner's payment of the court ordered restitution.

F. As to the issue of whether the Division properly assessed the fraud penalty against petitioner, it is quite clear that such assessment was proper. It must be noted that petitioner's representative admitted, at the hearing, that petitioner was guilty of civil fraud (***see***, Finding of Fact "16"). Even had such admission not been made, petitioner's plea of guilty to the charge of Grand Larceny in the Third Degree resulting from its underreporting the amount of sales and use taxes due to the State of New York for the period September 1, 1992 through February 28, 1995, collaterally estops petitioner from challenging the civil fraud penalty imposed under Tax Law § 1145 (a)(2) for that period (***Matter of Ianniello***, Tax Appeals Tribunal, November 25, 1992; ***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989).

G. Petitioner claims that it was caused undue harm as a result of the Division's failure to present a claim for civil penalties and interest prior to or at the plea hearing and contends that the equitable theory of laches should, therefore, apply in this case.

In order to invoke laches, petitioner must prove, in addition to a lapse of time prior to asserting a right, the existence of circumstances by which it was prejudiced (75 NY Jur 2d, Limitations and Laches, §§ 4 and 337). As has already been stated herein, the Division was within its rights to assess civil penalties and interest after the conclusion of the criminal proceeding (***see***, Conclusion of Law "C", "E" and "F"). The sentencing of petitioner took place in November 1996, payment of restitution occurred in December 1996 and the Notice of Determination in this matter was issued on October 27, 1997, ten months later. Petitioner has made no showing of any prejudice resulting from the lapse of this ten-month period.

In any event, it is well settled that the defense of laches is not available against a governmental entity acting in its governmental capacity to enforce a public right or to protect a public interest (***Flacke v. NL Industries, Inc.***, 228 AD2d 888, 644 NYS2d 404; ***Matter of Cortlandt Nursing Home v. Axelrod***, 66 NY2d 169, 177, 495 NYS2d 927, 932, ***cert denied*** 476 US 1115). A similar rule applies with respect to the defense of laches against an administrative agency (***Flacke v. NL Industries, Inc., supra***; ***Matter of Levey v. Catherwood***, 33 AD2d 1066, 1067, 307 NYS2d 511). In the present matter, the Division was attempting to enforce State taxing statutes and to collect amounts of sales and use taxes which were collected, but not paid over to the Division, by petitioner in its fiduciary capacity. Therefore, the defense of laches may not be interposed as a defense by petitioner in this case.

H. Finally, petitioner contends that the Division's acceptance of the first check in the amount of $76,105.00 which contained an endorsement which stated that the check was restitution for sales tax including penalties and interest through February 28, 1995 (***see***, Finding of Fact "8") constituted an accord and satisfaction and, as a result, the Division should now be precluded from seeking additional amounts of civil penalties and interest for the same period.

Although it must be noted that the Division devoted a substantial portion of its brief to this contention by petitioner, the evidence in the record is, in and of itself, sufficient to reach the conclusion that petitioner's argument is wholly without merit. While it is true, as petitioner points out, that the initial check was returned to petitioner because it had been issued in an incorrect amount (the actual amount owed was $76,194.27, not $76,105.00 which was the amount of the first check), the letter from Gary Alpert, an attorney with the Division's Revenue Crimes Unit, to petitioner's representative in the criminal proceedings, Attorney Harvey Arnoff, clearly stated that the check was being returned in order for James Belt to present the Division

with a certified check in the amount of $76,194.27 *and* the letter further stated that the $76,194.27 "covers only payment of the tax liability and does not include interest or petnalties."

In response to Mr. Alpert's letter, Mr. Arnoff sent a letter to Mr. Alpert confirming that "the check tendered to you on December 19, 1996 in the amount of $76,194.27 is for sales tax only and is not inclusive of interest and penalties if applicable." The check, dated December 12, 1996 contained an endorsement which stated that it was "[i]n full satisfaction of all Sales Tax Liability through 2/28/95." Unlike the previous check, there was no assertion that it included penalties and interest. Accordingly, there can be no valid argument that the Division's acceptance of this check constituted an accord and satisfaction which could estop the Division from thereafter assessing penalties and interest.

I. The petition of Fireside Mobile Home Leasing Co., Inc. is denied and the Notice of Determination dated October 27, 1997 is hereby sustained.

DATED: Troy, New York
March 16, 2000

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE